# DRAFTER'S NOTE
## FROM THE
## LEGISLATIVE REFERENCE BUREAU

LRB–1428/1dn
MGD:jld:km

January 9, 2001

Missy:

1. This bill differs from 1999 Assembly Bill 465 (AB–465), as amended in the assembly, in a number of ways. First, using recommendations provided at the end of the 1999–2000 legislative session by Professor Thomas Hammer (the reporter for the Criminal Penalties Study Committee (CPSC) and chair of its code reclassification subcommittee), this bill classifies felonies that were created during that session under the A–I classification scheme. (If you would like me to provide you a list of those crimes and a description of how they are treated in this bill, please let me know.) At the same time, the bill repeals certain provisions enacted in 1999 Wisconsin Act 48 relating to the controlled substance methamphetamine. As I mentioned in our phone conversation, under reconciliation provisions contained in Act 48, methamphetamine would have been treated in the same manner as certain other hallucinogenic and stimulant drugs had AB–465 been enacted last session. The repeal of the provisions relating to methamphetamine in this bill produces the same result.

Second, the bill makes minor changes in a few of the provisions in AB–465 to make them clearer or more workable. *See, e.g.*, ss. 302.11 (7) (ag), 302.113 (9) (ag), and 302.114 (9) (ag) (defining "reviewing authority" to simplify language in provisions relating to parole and extended supervision (ES) revocation hearings). Third, the bill includes a new effective date. (*See* item 2. below.) Fourth, the bill makes minor changes to ensure that current law provisions designed to apply only to indeterminate or bifurcated sentences do not apply to another type of sentence. *See, e.g.*, s. 302.045 (3) (clarifying that parole eligibility under the challenge incarceration program only extends to persons serving indeterminate sentences). Fifth, there are a number of provisions that required renumbering or new cross–references as a result of either legislation enacted last session or other changes within the bill itself.

Sixth, the bill makes certain substantive changes that should have been made in AB–465 to address gaps or ambiguities in 1997 Wisconsin Act 283. The following table briefly describes those changes:

| Statute section | Summary |
|---|---|
| 302.11 (7) (e), 302.113 (9) (f), 302.114 (9) (e) | Authorizes consolidation of all parole or ES revocation proceedings that relate to a single individual |

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| 302.113 (8m), 302.114 (8m) | Authorizes department of corrections (DOC) to take physical custody of a person alleged to have violated ES (to mirror provision in current law authorizing DOC to take custody of person alleged to have violated parole) |
| 302.113 (9) (e), 302.114 (9) (d), 908.08 (1) | Authorizes videotaped depositions and use of videotaped statement of a child in ES revocation hearings (to mirror current law provision relating to use of videotape in parole revocation hearings) |
| 973.15 (2m) (b) | Specifies how concurrent and consecutive sentences are to be served when all crimes involved were committed on or after December 31, 1999 |
| 973.15 (2m) (e) | Addresses revocation in multiple sentence cases |

2. Based on your instructions, the bill delays the effective date of the changes in the felony classification system to the first day of the seventh month after publication. Thus, if the bill becomes law on March 15, 2001, the new felony classifications apply to crimes committed on or after October 1, 2001.

AB–465, however, did not delay the effective date for certain changes relating to ES revocation proceedings. Not having a delayed effective date in AB–465 for these changes made sense. Since all bifurcated sentences must include a term of confinement of at least one year, *see* s. 973.01 (2) (b) (intro.), no revocation hearings could occur until after December 31, 2000. Thus, had AB–465 been enacted, courts would have had ample time to prepare for their new role in revocation hearings.

That lead time is now gone. Therefore, the bill delays the effective date for all of the changes relating to ES revocation proceedings. Some of those provisions, however –– such as those relating to videotaped depositions, ss. 302.113 (9) (e) and 302.114 (9) (d), or those relating to review of revocation decisions by certiorari, ss. 302.113 (9) (g) and 302.114 (9) (f) –– could be implemented more quickly. I delayed the effective date for those provisions for consistency reasons. But if you would like, I can redraft the bill or draft amendments so that changes that require less preparation time take effect sooner — for example, upon the bill becoming law.

3. The bill includes an initial applicability provision for the joint review committee on criminal penalties. Under that provision, the requirement that the committee review all bills creating or revising criminal penalties only applies to bills introduced on or after January 1, 2002. Is that okay?

4. Please review the amount listed in the appropriation for s. 20.505 (4) (dr) to see if it is appropriate. (The figure is one–third of the amount that was listed for fiscal year 1999–2000 in AB–465 and is premised on the bill being enacted at the beginning of the legislative session.) In addition, please note that s. 16.47 (2) provides that, before the passage of the budget bill, neither house may pass a bill that increases the cost of state government by more than $10,000 annually unless the governor, the joint committee on finance or, in some cases, the committee on organization of either house recommends passing the bill as an emergency appropriation. (Of course, s. 16.47 (2) is a rule of legislative procedure; thus, the legislature determines the extent to which

it is enforced.) Finally, the bill does not appropriate money for the sentencing commission for the 2001–03 biennium. You may wish address that through the 2001–03 budget bill.

5. AB–465 required that the enhancers for repeat offenders (ss. 939.62 and 961.48) be applied after all other enhancers and that the enhancer for use of a dangerous weapon (s. 939.63) be applied after all but the repeat offender enhancers. Nevertheless, AB–465 did not specify the order in which the other surviving penalty enhancers are to be applied. Under the bill, "the court shall apply them in the order listed," but the intent of that language was for the enhancers listed in s. 973.01 (2) (c) 2. a. to be applied before the subd. 2. b. enhancer, which in turn would be applied before the subd. 2. c. enhancers. As far as I recall, the CPSC did not consider the order in which the subd. 2. a. enhancers are to be applied or the possibility that the order in which those enhancers are to be applied might matter. Consequently, they are simply listed in numerical order.

With respect to the drug crime enhancers (ss. 961.46 and 961.49), the bill's silence regarding sequencing does not matter, since they will not be applied in combination with the other enhancers. But the bill's silence does matter in cases in which more than one of the other subd. 2. a. enhancers applies. A judge applying the enhancers in one order will end up with a maximum term of imprisonment that differs from that which results from another judge applying them in a different order.

For example, assume a person commits a battery in a school zone, *see* s. 939.632, and the battery is adjudged a hate crime. *See* s. 939.645. If the former enhancer is applied before the latter, the term of imprisonment required for the battery (a Class A misdemeanor) is increased under s. 939.632 (2) (b) by three months. The hate crime enhancer, s. 939.645 (2) (b), then converts it to a felony with a maximum term of imprisonment of two years. But if the enhancers are applied in the other order, the hate crime enhancer first converts it into a two–year felony. Under s. 939.632 (2) (a), the maximum period of imprisonment is then increased to seven years.

If you would like the bill to specify the order in which the subd. 2. a. enhancers are to be applied, I can redraft the bill or draft an amendment to have it do so. Alternatively, given that the number of cases in which the subd. 2. a. enhancers are combined is likely to be small, you may simply want the court of appeals or the supreme court to resolve this matter.

6. There is also one other unresolved question relating to penalty enhancers. Under s. 939.32 (1) (bm), an attempt to commit a Class I felony is penalized as a Class A misdemeanor, unless a penalty enhancer –– other than one of the enhancers for repeat offenders –– applies. I have been unable to determine whether the CPSC intended to create a repeat offender exception to the general penalty enhancer exception or whether that resulted from an oversight in drafting. I have contacted Prof. Hammer

regarding this, but I have yet to receive a response from him. I will let you know if I do.

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